No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# REPLY BRIEF FOR THE PETITIONER

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

Counsel for Petitioner

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Petitioner John E. Mallard respectfully submits this reply brief in response to arguments first raised in the brief for the respondent United States District Court for the Southern District of Iowa

and the amicus brief submitted by the Association of the Bar of the City of New York.

## ARGUMENT

### I

### THE COMMON MEANING OF THE WORD "REQUEST" IMPLIES THAT AN UNWILLING ATTORNEY MAY DECLINE A REPRESENTATION UNDER 28 U.S.C. SECTION 1915(d)

Respondent argues that the word "request" as used in Section 1915(d) is ambiguous because its dictionary definition includes as a potential meaning "the state of being sought after: DEMAND."[1]

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[1]The definition cited by Respondent is the fourth potential definition for the noun "request." Webster's Ninth New Collegiate Dictionary (1985) at 1001. However, "request" is used as a verb in Section 1915(d) and the definition for the verb "request" is as follows: "1: To make a request to or of; 2: To ask as a favor or privilege; 3: obs: To ask (a person) to come or go to a thing or place; 4: To ask for." Id. at 1002. The Respondent notes that "request" may sometimes be given the same meaning as "require." This is true when the word "request" is used as a term of art such as, for example, in the case of a will, trust, or notice given to creditors in connection with a probate. See Abbott's Law Dictionary (1879), Volume II, p. 415; J. Frailey, Words & Phrases Judicially Defined (1905), Volume VII, pp. 6120-6122. In light of this particular use of "request" as a term of art, Black's Law Dictionary expanded the definition of "request" to include the meaning of a "direction or command in law of wills." Cf. Black's Law Dictionary (2d ed. 1910) at 1022 with Black's Law Dictionary (4th ed. 1968) at 1468.



But this analysis disregards the principle of statutory interpretation that words used in a statute are generally to be given their usual, plain, ordinary, and commonly understood meaning.[2]

The common meaning of the word "re-

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[2]See Crane v. Commissioner of Internal Revenue, 331 U.S. 1, 6-7 (1947) (the word "property" as commonly used does not mean "equity"); Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925) ("the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover").

quest" is "to ask."[3] Consequently, "request," as it is commonly used and as it appears in Section 1915(d), implies that an unwilling attorney may decline a representation. United States v. 30.64 Acres of Land, 795 F.2d 796, 800 (9th Cir. 1986).

Respondent asserts that the Eighth Circuit has been joined by other circuit courts in its interpretation of Section 1915(d), apparently because these courts have used the words "appoint" and "assign" interchangeably with the word "request". But the other courts did not construe Section 1915(d) in the context of determining whether this statute authorizes appointment of counsel to involuntary service. Petition for Certiorari, pp. 13-17. Consequently, it

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[3]See note 1 supra.



is not the statutory language which is ambiguous but rather the words "appoint" and "assign" as used in the authorities upon which the respondent relies, including recent circuit court opinions,[4] a 1948 decision of this Court,[5] early

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[4]The ambiguous use of the word "appoint" in McKeever v. Israel, 689 F.2d 1315 (7th Cir. 1982), apparently causes the respondent to question the position of the Seventh Circuit even though it is clearly expressed in Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) ("A court has the authority only to request an attorney to represent an indigent, not to require him to do so") (emphasis in original). Amicus New York City Bar also suffers from the confusion engendered by the use of the word "appoint" although it is difficult to understand why it is confused regarding the position of the Fifth Circuit in Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982) ("[a] lawyer should not be conscripted into a Section 1983 case simply because he is a member of the bar, but this does not mean that all members of the bar should be denied the opportunity to assist the cause of justice under the authority of a court appointment").

[5]In Adkins v. E.I. DuPont De Nemours & Co., Inc., 335 U.S. 331 (1948), this

cases construing Section 1915(d),[6] and the Congresional Record.[7]

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Court used the term "appoint" in the course of holding that the poor person's lawyers were not required to furnish affidavits of poverty. The lawyers in Adkins were retained without the exercise of any "appointment" power by the court. Id. at 333.

[6]Only one of those cases required a determination as to whether Section 1915(d) authorizes appointment of counsel to involuntary service, and that case supports the Petitioner's position herein. The court in Whelan v. Manhattan Ry. Co., 86 F. 219 (C.C.S.D.N.Y. 1898), considered the procedure to be used in making an "assignment" and recognized that the attorney who was already involved in the case on behalf of the poor person might choose to withdraw from the representation.

[7]The bill was described as "providing when plaintiff may sue as a poor person, and when counsel shall be assigned by the court." 23 CONG. REC. 5199 (1892) (see p. 7a infra). However, it should not be inferred from this description, as the Respondent submits, that "[t]o the drafters of the section, the words 'request' and 'assign' were interchangeable." Respondent's Brief, p. 12. There is nothing in the record to indicate that Mr. Culberson was the author of the bill he introduced. The Report of the House Committee on the Judiciary was submitted by Mr. Stockdale. H.R. REP. NO. 1079, 52d Cong., 1st Sess.



II

## THE LEGISLATIVE HISTORY OF 28 U.S.C. SECTION 1915(d) DOES NOT SHOW THAT CONGRESS INTENDED TO REQUIRE ATTORNEYS TO PROVIDE COMPULSORY REPRESENTATION UPON REQUEST

According to the respondent's viewpoint, the legislative history of Section 1915(d) "suggests" that Congress intended to confer upon federal courts the power

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(1892) (see p. 1a infra). In addition, even if Mr. Culberson had been associated with the drafting process, it is not reasonable to assume that while he was speaking on the floor of the House for the purpose of generally identifying the bill, he would have chosen his words as carefully as in drafting the bill. Furthermore, the label applied by Mr. Culberson was not even the official title of the bill. The referenced portion of the Congressional Record was entitled "OPENING UNITED STATES COURTS TO CERTAIN AMERICAN CITIZENS" and followed the official title of the Report of the House Judiciary Committee. Id. Finally, and most importantly, Congress did not pass the bill based upon its general description as extemporaneously uttered by Mr. Culberson. The legislators voted on the basis of the statutory language itself.

to compel attorneys to represent indigent civil litigants.[8] However, this theory is not supported by the scant[9] legislative history.[10] Consequently, the

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[8]Assuming that this Court finds the meaning of the word "request" as used in Section 1915(d) to be clear and unambiguous, there is no need to examine the legislative history of this statute. When the language of a statute is plain and unambiguous, there is no occasion for construction, see Ex Parte Collett, 337 U.S. 55, 61 (1949), Lake County v. Rollins, 130 U.S. 662, 670-71 (1889), the statute must be given effect according to its plain and obvious meaning, see Hilton v. Sullivan, 334 U.S. 323, 335-36 (1948), and the court cannot indulge in speculation as to the probable or possible intentions of Congress, see Bruner v. U.S., 343 U.S. 112, 116 (1952).

[9]The legislative history consists of a Report by the House Judiciary Committee and an excerpt from the Congressional Record. These documents are retyped in the appendix hereto.

[10]Respondent relies heavily upon a statement that non-attorney court personnel could be compelled to "issue, serve all process, and perform all duties in such cases" without pay. 23 CONG. REC. 5199 (1892). But the statute evidences an intent to treat court personnel differ-



intention of the legislature is most properly ascertained primarily from the language of the statute itself. A. Magnano Co. v. Hamilton, 292 U.S. 40, 46-47 (1934). As noted above, the common meaning of the word "request" implies that an attorney may decline a representation.

A. The Purpose of Section 1915 Will Not Be Frustrated by Allowing an Unwilling Attorney To Decline a Request.

The concern prompting passage of the predecessor of Section 1915(d) was that access to the courts not be denied "for want of sufficient money or property to enter the courts under their rules."[11]

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ently than attorneys. See note 12 infra.

[11]H.R. REP. NO. 1079, 52d Cong., 1st Sess. (1892) (pp. 1a-2a infra). As the House Committee on the Judiciary noted in its Report: "Will the Government allow its courts to be practically closed to its own citizens, who are conceded to

The problem for poor persons posed by court costs and fees was viewed separately from the problem of affording counsel. R. Smith, Justice and the Poor, at 20-32 (1919). In enacting Section 1915, Congress eliminated court costs and fees but left the issue of representation to the discretion of the court and the requested attorney. Thus, Congress was concerned with providing access to the courts, not with providing compelled, uncompensated representation to indigent persons.[12]

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have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice?" Id. (see pp. 5a-6a infra).

[12]It is instructive to note the difference in the language used in Sections 1915(c) and (d) which provide, in relevant part, as follows:

"(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in



Respondent argues that Section 1915(d) should not be construed to permit an attorney to decline a court request because this would render the statute ineffective or inefficient. But this argument assumes that Congress intended to assure representation to indigent civil litigants, and does not comport with the foregoing discussion of legislative purpose.

The lessened concern for providing counsel is evident not only from the use of the word "request" but also because the decision to seek counsel is left to the discretion of the court, unlike other

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other cases. . . .

(d) The court may request an attorney to represent any such person unable to employ counsel. . . ." (Emphasis added).

laws requiring courts to appoint counsel.[13] In addition, Congress decided not to compensate lawyers for their work but would have done so if it had wanted to provide a more efficient and effective method for assuring representation of indigent civil litigants.[14]

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[13] See, e.g., 18 U.S.C. Section 3006A(b); 25 U.S.C. Section 1912(b); 42 U.S.C. Section 1971(f).

[14] See, e.g., 18 U.S.C. Section 3006A(d); 28 U.S.C. Section 1912(b); see also the Legal Services Corporation Act, 42 U.S.C. Section 2996 et seq. As a further alternative, Congress might have provided that successful litigants would be awarded attorneys fees. See, e.g., 42 U.S.C. Section 1988. This type of provision creates an incentive for lawyers to investigate claims and determine the likelihood of success prior to bringing an action. This procedure serves a valuable purpose in eliminating less meritorious actions which would otherwise burden the courts. Congress expected actions under 42 U.S.C. Section 1983, such as the action in the underlying case of Mark Allen Traman et al. v. Steve Parkin, et al., to be brought by attorneys who would have the freedom to investigate the case and decide whether to offer their services as coun-



A failure to obtain counsel for an indigent civil litigant would not frustrate the primary purpose of Section 1915 because the poor person would still have access to the court and could represent himself.

Even assuming that Congress was especially concerned with providing counsel to indigent civil litigants, in view of the commitment of the bar to provide pro bono services, it is unlikely that the court would be unable to find an attorney who would be willing to volunteer his services. Merely because the first lawyer asked by the court chooses to

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sel. Construing Section 1915(d) in the manner suggested by the petitioner, at least with respect to poor persons having Section 1983 claims, would afford those persons the opportunity for representation which Congress intended.

decline the representation, as in the instant case, does not demonstrate that another attorney who felt more comfortable with the task would not be willing to step forward.[15]

Respondent argues that authorizing a court to request but not compel an attorney to undertake a representation would render the statutory language superfluous since courts could have acted on their own to ask lawyers to provide

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[15]In connection with the consideration of the availability of counsel, it has been suggested that courts should encourage the use of retained counsel more strongly because this provides a market test of the merits of the poor person's claims, and might also aid the courts in determining whether the claims justify the court seeking counsel under Section 1915(d). McKeever v. Israel, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J. dissenting).



representation.[16] However, one must consider the historical context in which Section 1915(d) was enacted. Courts of the day did not concern themselves with the rights of poor persons since the poor, by definition, were not even able to obtain access to the courts. Consequently, it is not unreasonable to assume that Congress enacted Section 1915(d) to encourage courts to utilize the pro bono

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[16]The principle that statutory language should be given an interpretation which does not render that language superfluous, see South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 510 n.22 (1986), has questionable validity where the statute being examined contains other language which is clearly superfluous. The balance of Section 1915(d) which authorizes the court to dismiss the case "if satisfied that the action is frivolous or malicious" is clearly superfluous based upon the inherent power of the court to dismiss such actions. See Brinkley v. Louisville & N. R. Co., 95 F. 345, 348 (C.C.W.D.Tenn. 1899).

services of attorneys in favor of poor persons.

B. The Word "Request" in Section 1915(d) Was Selected Deliberately and There Were Rational Bases for Selecting This Word

1. Congress Used the Word "Request" in Section 1915(d) in Place of the Word "Appoint" or "Assign" Which Appeared in Existing Statutes

Congress was motivated to enact Section 1915 by the fact that "many humane and enlightened States have such a law." H.R. REP. NO. 1079, 52d Cong., 1st Sess. (1892) (<u>see</u> p. 6a <u>infra</u>). Eleven states had such laws as of the time of the enactment of Section 1915(d) and these state laws were presumably inspired by the statute of 11 Henry VII, c. 12



(1495).[17] It is significant to note that all of these statutes, in describing the power of the court to provide counsel for poor persons, used the words "assign" or "appoint."[18] It is presumed that the

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[17]<u>See</u> Fisch, "Coercive Appointments of Counsel <u>In Forma Pauperis</u>: An Easy Case Makes Hard Law," 50 Mo. L. Rev. 527, 543-47 (1985).

[18]<u>See</u> 11 Hen. VII, c.12 (1495) (assign counsel and appoint attorneys); Illinois Revised Statutes Chapter 33, Section 5 (1889) (assign); Indiana Laws, Civil Code Section 17 (1881) (assign); Kentucky General Statutes Chapter 26, Section 1 (1873) (assign); Missouri Revised Statutes Chapter 43, Section 2918 (1889) (assign). The Laws of the State of New York, Article Third, Section 460 (1876) (assign); North Carolina Public Laws, Chapter 96, Section 2 (1868-69) (assign); Tennessee Code Chapter 4, Section 3980 (1858) (appoint); Sayles Texas Civil Statutes, Title 27, Chapter 3, Article 1125 (1889) (appoint); Code of Virginia, Title 49, Chapter 173, Section 3538 (1887) (assign); Acts of the Legislature of West Virginia Chapter 146, Section 1 (1882) (assign). Petitioner was not able to obtain access to the law of Arkansas as of 1892 but the successor to that law, Arkansas Statutes Annotated Section 27-403 (1947), provided, prior to

legislature understood the meaning of the words used and that it intended to use them. U.S. v. Goldenberg, 168 U.S. 95, ___ (1897). Moreover, where the words or provisions of a statute differ from those of a previous statute on the same subject, they are presumably intended to have a different construction or meaning, and to denote an intention to change the law. U.S. v. Stroop, 109 F.2d 891, 893-94 (6th Cir. 1940); Taft v. Commissioner of Internal Revenue, 92 F.2d 667, 669 (6th Cir.) affirmed 304 U.S. 351 (1937). Consequently, the fact that Congress chose to substitute the word "request" for the words "assign" or "appoint" used in all other similar statutes of the day indicates that Congress intended to

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its repeal in 1985, that "The court . . . may assign him counsel."



select a different meaning and that its selection was deliberate.

2. At the Time of the Enactment of Section 1915(d), English Attorneys Were Permitted To Decline an Indigent Person's Request for Representation

Respondent assumes in its historical analysis that Section 1915(d) was adopted directly from the statute of 11 Henry VII, c. 12 (1495) and that its references to "assign" and "appoint" were consequently the meanings intended to be given to the word "request" in Section 1915(d). As discussed above, it is fair to assume that Section 1915 was motivated by state statutes similar to the statute of 11 Henry VII, but it is not fair to assume that Congress intended to adopt the same method for providing attorneys to indigent civil litigants, since the drafters of Section 1915(d) deliberately replaced

the references to "assign" or "appoint" with "request." Under such circumstances, the change in terminology is presumably intended to have a different construction or meaning and to denote an intention to change the law. U.S. v. Stroop, 109 F.2d 891, 893-94 (6th Cir. 1940).

The use of the word "request" demonstrates not only an intention to depart from the statute of 11 Henry VII, but also comports with the practice which was in effect in England at the time of the adoption of Section 1915(d). The statute of 11 Henry VII was in effect for almost four centuries from 1495 until 1883 when it was repealed and replaced by the Statute Law and Civil Procedure Act. R. Smith, Justice and the Poor, at 21-22 (1919). In light of the longevity of the



statute of 11 Henry VII and the fact that England had abandoned it, it is not reasonable to assume that Congress would have decided to adopt an act which had been determined to be inadequate. It is more likely that Congress would have considered the current procedure in England.

As of 1892, the practice for obtaining an attorney for a poor person in England consisted of the poor person finding a solicitor and counsel and requesting their services, and this request could be declined. The procedure has been described as follows:

> "The would-be pauper plaintiff has first to find a solicitor who will write out his case and prepare his affidavit, and a counsel who will undertake it right through the courts without the chance of getting any remuneration--unless they seek to charge him preliminary fees, which he often is unable to pay. A judge

> has power to assign a solicitor and counsel to the applicant and will usually choose those who have backed his application. . . It is understood that in England several of the judges and the council of the Law Society favor a reform of the present Rules as to proceedings by or against poor persons . . . but the representatives of the Bar are opposed to the scheme. The proposed new Rules have not been published; but from the Memorandum of the Bar Council setting forth their views, it appears that their main objections are: (1) the imposition of a heavy burden on the Bar. . . ." Bentwick: Legal Aid for the Poor, 47 Law Journal (1912) 48.

It appears from the above article that the Bar of England, after centuries of experience under the statute of 11 Henry VII, Chap. 12, was reluctant to allow attorneys to once again be appointed without pay.[19] Similar sentiments likely existed in 1892, nine years after the repeal of the statute of 11 Henry VII.

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[19]The ABA, at its August, 1988 Annual Meeting took a similar position and passed a resolution "recommend[ing] that all jurisdictions provide by statute or rule of court that attorneys appointed to



Assuming that Congress was aware of the circumstances in England at the time of its enactment of Section 1915(d), cf. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946), it is probable that Congress would have viewed the change in English law with favor and would have adopted the new procedure which involved the making of a request.

3. At the Time of the Enactment of Section 1915(d), the Highest Courts of Several States Had Held That Attorneys Appointed To Represent Indigents Were Constitutionally Entitled To Compensation

As of the time of the consideration of the bill by Congress in 1892, the highest courts of three states had held that attorneys appointed to represent indigents were constitutionally entitled to

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represent persons who have a constitutional or statutory right to counsel receive reasonable compensation and full reimbursement for costs and expenses." ABA Resolution, Annual Meeting Report No. 10E (1988).

compensation. See Hall v. Washington Co., 2 Greene 473 (Iowa 1850); Webb v. Baird, 6 Ind. 13 (1854); County of Dane v. Smith, 13 Wis. 654 (1861). While the highest courts of other states had denied claims of appointed counsel for nonstatutory just compensation, see United States v. Dillon, 346 F.2d 633, 637 App. (9th Cir.) cert. denied, 382 U.S. 978 (1965), there was no clear tradition of the bar that unwilling attorneys could be compelled to represent indigent persons without compensation, see Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U.L.Rev. 735, 753 (1980). It must be presumed that Congress knew of the existence of the various court decisions at the time it was considering the enactment of Section 1915(d) which encompassed similar subject matter. See Prudential



Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946). In view of the state court holdings, and the manifest concern of Congress for the expenses which would be occasioned by Section 1915,[20] it appears that Congress may have intended to avoid any possibility of incurring significant expenses to attorneys, in connection with their representation of indigent civil litigants, by using the word "request" and seeking only attorneys who were will-

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[20]The legislative history includes statements to the effect that poor persons would not be permitted to enter the courts without money unless they first filed a statement under oath of their poverty and their inability to pay the costs of suit or give security therefor, and that the action was being commenced in good faith. "And to avoid possibility of imposition judgment may be rendered for costs as in other cases, so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him." H.R. REP. NO. 1079, 52d Cong. 1st Sess. (1892) (see p. 5a infra).

ing to act as pro bono volunteers on a gratuitous basis.

III

MANDAMUS IS THE PROPER REMEDY TO CORRECT A JUDICIAL USURPATION OF POWER IN THE FORM OF A MANDATORY APPOINTMENT OF COUNSEL THAT IS NOT AUTHORIZED BY 28 U.S.C. SECTION 1915(d)

Respondent argues that the Eighth Circuit was correct in denying petitioner's application for a writ of mandamus because the district court acted within its discretion in appointing the petitioner. But the question presented herein is not whether the district court abused its discretion in appointing the petitioner over his objection that he is not competent. The question presented is whether the district court was empowered by Section 1915(d) to require an unwilling attorney to represent a person making a request for counsel thereunder.



If there was no legal basis for the respondent to require the petitioner to accept the requested representation, then

> "use of the writ of mandamus in this case would come squarely within its 'traditional use confin[ing] an inferior court to a lawful exercise of its prescribed jurisdiction' Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943), for respondent's action would fall into the category of 'usurpation of power' against which mandamus is classically available. DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945)." Estelle v. Justice, 426 U.S. 925, 929-30 (1976) (Rehnquist, J. dissenting).

Assuming that the arguments in this case demonstrate that the district court has no power under Section 1915(d) to require the petitioner to undertake a representation, then the district court would have usurped its power and jurisdiction in requiring the petitioner to so serve, and mandamus would be the proper remedy.

This case does not suffer from any of the common defects which lead to a denial of a writ of mandamus. The order of the district court was not otherwise appealable and an application for a writ of mandamus from the Eighth Circuit was "the only means of forestalling [the] intrusion by the federal judiciary". Will v. United States, 389 U.S. 90, 95 (1967). In addition, the order of the district court, if not corrected by mandamus, would have adverse effects on the petitioner by requiring him to represent the plaintiffs in the case of Mark Allen Traman, et al. v. Steve Parkin, et al., without any other opportunity to dismiss his wrongful appointment. Cf. De Beers Consol. Mines Ltd. v. U.S., 325 U.S. 212 (1949) (mandamus was a proper remedy to correct an unusual preliminary order, not



appealable in itself and found to be outside the power and jurisdiction of the lower court, which would cause injury which could not subsequently be redressed). Finally, if the district court has improperly exercised its authority to conscript petitioner, the prospect that this improper exercise of authority may be repeated makes mandamus particularly appropriate. Estelle, 426 U.S. at 930, citing La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

## IV

## THE CIRCUIT COURT'S DENIAL OF THE APPLICATION FOR A WRIT OF MANDAMUS CANNOT BE JUSTIFIED BASED UPON THE INHERENT AUTHORITY OF THE DISTRICT COURT

### A. The District Court Relied Upon Section 1915(d) In Holding That It Was Empowered To "Appoint" and the Inherent Authority of the Court Is Not Relevant To a Determination of the Propriety of Mandamus

In ruling on the petitioner's motion to dismiss his appointment, the district court framed the issue broadly stating that "attorney Mallard argues . . . that the court lacks power to appoint him to represent an indigent civil litigant." Pet. App. p.2a. However, notwithstanding the broad nature of the issue addressed by the district court, the district court limited its holding to a finding that it was authorized to make the appointment based upon Section 1915(d), citing Coburn v. Nix, Civ. No. 86-716-B (S.D.Iowa June 16, 1987).[21] Pet. App. p.3a.

Consequently, in light of the history

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[21]In Coburn, the district court again framed the issue broadly as to whether the court has the power to compel an attorney to serve as counsel. See Opp. Pet. p.1a. Again, the district court's holding was based solely upon its construction of Section 1915(d). Opp. App. pp.4a-5a.



of this case, it cannot be contended that the district court relied upon some inherent authority to justify its appointment of the petitioner to serve as counsel. Even if the district court thought that it had inherent authority, such authority would have been discretionary and non-reviewable and the court may have decided not to appoint counsel.[22]

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[22]The discretionary authority of the court to request counsel under Section 1915(d) has been greatly circumscribed such that, in the event a prima facie case is set out by the poor person seeking counsel, any refusal to provide counsel would be an abuse of discretion. See McKeever v. Israel, 689 F.2d 1315, 1320 (7th Cir. 1982) (divided court held that "failure of the district court to exercise its discretion under Section 1915(d) to seek counsel was an abuse of discretion", with Posner, J. dissenting on the ground that the discretion of the district court was being constrained). As noted in the statement of the case, the procedure for the appointment of attorneys under Section 1915(d) was established at the direction of the Eighth Circuit, and it was in response to this directive that the district court pre-

Finally, the petitioner was required to rely upon the order of the district court in seeking a writ of mandamus from the Eighth Circuit and in bringing this case. It is wholly outside of the question presented herein to consider whether courts have an inherent authority to appoint counsel for indigent civil litigants. See Supreme Court Rule 34.1(a).[23]

B. The District Court Has No Inherent Authority To Make Mandatory Appointments of Counsel for Civil Litigants

1. There Is No Constitutional Provision From Which the Court Might Derive Inherent Authority to Appoint Counsel for Civil Litigants

Amicus New York City Bar cites numerous cases for the proposition that courts are authorized to appoint attorneys to render service to indigent persons. However, it is notable that these cases involve criminal proceedings. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966).

Courts derive inherent authority from the Constitution which acknowledges the judiciary as a separate branch of government and empowers it to insure that constitutional provisions relating to

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pared a list of attorneys and appointed the petitioner. Consequently, it is not possible to know whether the district court would have attempted to exercise some extraordinary inherent authority to appoint the petitioner in the event its actions would not be reviewable by the Eighth Circuit.

[23]A refusal by this Court to examine this new issue would in no way prejudice the district court in its future actions and the district court might subsequently seek to again "appoint" the petitioner to service on the basis of some inherent authority if it determines that it is empowered to do so and exercises its discretion to do so.

judicial actions are given effect. In this regard, the Sixth Amendment provides, in relevant part, that "[In] all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense." U.S. Const. amend. VI. Based upon this directive, it is reasonable to assume that a court might make a mandatory appointment of counsel to insure the representation of an indigent criminal defendant, at least under those circumstances where the client is so unpopular that no attorney is willing to take on the representation.[24] See Powell

[24]A mandatory appointment of counsel under such limited circumstances fulfills a compelling interest of the defendant to have access to counsel and a compelling interest of our government, as expressed in the Constitution, to provide counsel as a key ingredient of our system of justice. However, the mandatory appointment does not foreclose the right of the attorney who is appointed to demonstrate that he may likewise have a compelling



v. Alabama, 287 U.S. 45 (1932). However, there is no similar directive in the Constitution which gives courts an inherent power to make a mandatory appointment of counsel for indigent civil litigants.

2. The Authority of the Court To Regulate the Proceedings Pending Before It Does Not Empower It To Require An Unwilling Attorney To Become Involved in a Certain Proceeding

Amicus New York City Bar cites numerous cases for the proposition that courts have inherent authority to appoint counsel in connection with their activities in administering justice.[25]

interest not to be the attorney who is required to represent the criminal defendant.

[25]Amicus New York City Bar also identifies Rule 83 of the Federal Rules of Civil Procedure and 28 U.S.C. Section 2071 as provisions granting the court additional powers. However, these provisions are so general in recognizing the

But the cases cited demonstrate only that the court has the power to insure that all parties who appear before it, including attorneys as the representatives of any parties appearing in cases before it, abide by such rules as the court may prescribe for the purpose of insuring that the proceedings are fair. However, it should not be presumed based upon this circumstance, that courts have the power to also compel attorneys admitted to the bar to become involved in a particular civil proceeding as part of the exercise of the court's authority to regulate that proceeding.

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right of the court to prescribe rules to regulate its practice, that they do not appear to expand in any appreciable manner the inherent authority of the court.



The petitioner acknowledges that the court has inherent authority to regulate the conduct of the bar to the extent necessary to insure that its members are competent and ethically and professionally responsible. But there is nothing implicit in the court's authority to regulate these matters which would empower the court to make a mandatory appointment of counsel for a civil litigant.

### 3. The Court Does Not Derive Any Inherent Authority To Appoint Counsel for Civil Litigants Based Upon the Rules of Professional Responsibility or an Atorney's Obligations Thereunder

Respondent and Amicus New York City Bar argue that the Iowa Code of Professional Responsibility for Lawyers creates an obligation of petitioner to represent the disadvantaged and provide free legal

services. Iowa Code of Professional Responsibility for Lawyers, EC 2-27. However, there are three problems with this statement as it relates to the instant case. First, this statement begs the question regarding how the court derives its authority to make the initial appointment. Without considering this first issue, the court could make numerous, frequent, and unreasonable appointments without any need to justify its action, and attempt to shift the burden to the attorney who has been appointed to demonstrate a compelling reason why that appointment should be dismissed.

Secondly, it is in no way clear that the petitioner is ethically obligated to accept the appointment in view of the petitioner's background and claims of incompetence. Even though the district



court has held that the petitioner is competent, it has never been determined as a matter of professional responsibility that the petitioner's application of a higher standard of competence is unethical. In fact, viewed from the other direction, the district court's finding of "competence" would in no way be binding upon the parties who the petitioner would be forced to represent and who might later sue the petitioner for malpractice. Ferri v. Ackerman, 444 U.S. 193 (1979).

Thirdly and finally, the proceedings below in no way amount to a disciplinary proceeding as to whether the petitioner has complied with the Iowa Code of Professional Responsibility for Lawyers. Certainly the holding in Hall v. Washington Co., 2 Greene 473 (Iowa 1850),

which might properly be considered part of the lore of the profession for Iowa attorneys, suggests that a lawyer could refuse a court appointment solely on the ground that there was no provision for compensation. In addition, if the petitioner was to be subjected to a disciplinary proceeding, it would be before an appropriate board, with a hearing that would insure procedural due process and allow for a consideration of many facts not appearing in the record below which might demonstrate a compelling reason for declining an appointment, such as in the event the assigned representation would create financial hardship. See Family Division of Trial Lawyers v. Moultrie, 725 F.2d 695, 705 (D.C.Cir. 1984) ("An unreasonable amount of required uncompensated service might qualify").



V

## CONSTITUTIONAL ARGUMENTS

### A. Freedom of Speech

The Respondent implies that the petitioner's expressed dislike for litigation is unexplained and suspect. This Court has noted in Sherbert v. Verner, 374 U.S. 398 (1963) that a court might inquire into whether there is (i) a sincere belief in the importance of the First Amendment freedom which is being infringed or (ii) an insincere and fraudulent claim based upon malingering or deceit. Id., 374 U.S. at 407. While the record may not be as comprehensive as the respondent would like, there is nothing in the record to indicate that the petitioner's expressed feelings are insincere. In addition, to the extent that the respondent had any concern for the

intensity and nature of the petitioner's dislike for "confrontational and accusatory speech," it might have scheduled a hearing to cross-examine the petitioner on the statements in his affidavit. Because the district court did not do so, it is reasonable to assume that the court accepted the truth of the statements made by the petitioner at the time of his motion to dismiss the appointment but disregarded them as irrelevant to the relief requested. Cf. Townsend v. Rice, Civ. No. 84-655-A (S.D.Iowa February 10, 1987) (reprinted at Respondent's Brief App. 6) (the magistrate scheduled a hearing on a motion for permission to withdraw from an appointment for the purpose of making further inquiry).

B. Due Process and Equal Protection

Respondent acknowledges that certain



attorneys are exempted from receiving federal court assignments by reason of their participation in other pro bono work through the Volunteer Lawyers Project. The Respondent also acknowledges that attorneys who engage in pro bono work other than through the Project might also be considered for exemptions from service under the federal program. However, the Respondent fails to distinguish the unequal treatment accorded to the petitioner as compared with the exemption provided to the attorney in Townsend v. Rice, Civ. No. 84-655-A (S.D.Iowa February 10, 1987) (reprinted at Respondent's Brief App. 6). In Townsend, the court accepted the attorney's offer to provide pro bono services in the future and allowed that he could do so without being required to

act as a trial attorney. Id. The offer made by the attorney in Townsend is practically indistinguishable from the offer made by the petitioner "to volunteer [his] services for other volunteer lawyers projects with the Legal Services Program, in lieu of participating in the federal pro bono referral program for which [he was] not qualified" (J.A. 8). However, the petitioner was not granted a hearing or accorded an exemption.

C. Taking Private Property For Public Use Without Compensation

In addition to the authorities heretofore cited by petitioner for the proposition that an attorney's services constitute "private property," the petitioner adopts the reasoning and authorities set forth in Brief Point II by amicus State Bar of California.



## CONCLUSION

For these various reasons, the arguments made by the respondent and the amicus New York City Bar are not persuasive and 28 U.S.C. Section 1915(d) should be construed as authorizing the District Court only to request a pro bono volunteer to undertake the representation of indigent civil litigants. The judgment of the Court of Appeals should be reversed and a writ of mandamus should be issued directing the District Court to grant the petitioner's motion to dismiss his appointment.

Respectfully submitted,

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
Counsel for Petitioner

**APPENDIX**

52D CONGRESS,} HOUSE OF { REPORT
1st Session.} REPRESENTATIVES {No. 1079.

OPENING UNITED STATES COURTS TO CERTAIN AMERICAN CITIZENS.

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APRIL 14, 1892--Referred to the House Calendar and ordered to be printed.

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MR. STOCKDALE, from the Committee on the Judiciary submitted the following

**REPORT:**

[To accompany H. R. 8153.]

The Committee on the Judiciary, to whom was referred House bill 583, having considered the same, respectfully submit the following:

This bill proposes to open the United States courts to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money or property to enter the courts under



their rules.

The United States circuit and district courts were established in part, if not mainly, to furnish in each State an impartial tribunal in which other States and citizens of other States can try their causes free from the effects of local influences that might bias State tribunals.

The argument that people who can not pay or secure costs will seldom litigate about property worth over $2,000 only goes to show that but little expense will accrue to the Government by the passage into law of this bill, and does not affect its justice or the need of it. People may have claims to property by inheritance or devise, or by purchase, worth over $2,000, and it may be their only possessions, and they can not use it

to secure bondsmen or money to meet the demands for costs by reason of the fact that it is in dispute. These persons with honest claims may be defeated, and doubtless often are, by wealthy adversaries.

Corporations may destroy the head of a family, and his heirs who would have a right of action for support will be deprived of justice by the demand for costs.

It is no answer to say that they can sue in State courts, for the defendant can remove the cause to the United States court. And besides, some States do not have such a law. Others who have construed it to apply to their own citizens and not to nonresidents.

And if these people are not allowed in the United States courts, why admit the



wealthy, who can take care of themselves in the State courts better than the poor.

In short, this bill presents the question whether this Government, having established courts to do justice to litigants, will admit the wealthy and deny the poor entrance to them to have their rights adjudicated.

The proposed law will not admit of vexatious litigation. It is well guarded. In order to get the privilege of the courts which litigants with money can demand without question and compel the court to hear their cases, anyone of these people who desires to enter the courts without money must first file in the court a statement under oath that because of his poverty he is unable to pay the costs of said suit or action or to give security for the same. He must

also state that he believes he is entitled to the redress asked, and must set out the nature of his alleged cause of action.

The court may dismiss the suit at any time if it be made to appear that the allegation of poverty is probably untrue, or if he be satisfied that the alleged cause of action is frivolous or malicious.

And to avoid possibility of imposition judgment may be rendered for costs as in other cases, so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him.

The question is narrowed therefore to this: Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have



valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice? Even then they will not have an equal chance with other men, for men able to prosecute gain cases that would be dismissed by the court had it the power. Many humane and enlightened States have such a law, and the United States Government ought to keep pace with this enlightened judgment.

The Government will not determine questions involving the liberty of the citizen without furnishing him his witnesses on his demand. Property is next in importance, and the less a man has the more important it is to him, and the more reprehensible to deprive of it unjustly.

The committee recommend the passage of the substitute.

OPENING UNITED STATES COURTS TO CERTAIN AMERICAN CITIZENS.

MR. CULBERSON. Mr. Speaker, I now call up the bill (H. R. 8153) providing when plaintiff may sue as a poor person, and when counsel shall be assigned by the court.

The bill was read, as follows:

Be it enacted, etc., That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

SEC. 2. That after any such suit or action shall have been brought, or that



is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit.

SEC. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

SEC. 4. That the court may request any attorney of the court to represent such poor person, if he deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is probably untrue, or if he be satisfied that the alleged cause of action is frivolous or malicious.

SEC. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases.

Mr. CULBERSON. Mr. Speaker, the effect of this bill, if it should become law, will be to open the courts of the United States to a class of persons who are now denied the right of bringing suits in the courts of the United States, that have no money or property by which to comply with the rules of the courts in

respect to costs. This bill provides that any individual in this class who files an affidavit that he is not able to pay the money that is required to be deposited, or to give security for the costs, he may proceed in forma pauperis, and at the end of the suit a judgment for costs is issued as in other cases. If the plaintiff fails the judgment is rendered against him for the costs, and if defendant fails the judgment is given against him for the costs.

Mr. WILLIAM A. STONE. Will the gentleman yield to me for a question?

Mr. CULBERSON. Certainly.

Mr. WILLIAM A. STONE. In a case where the plaintiff is wholly unable to pay the costs where there is a judgment against him for the costs, how do the officers get their pay?



Mr. CULBERSON. They do not get any in that event.

Mr. WILLIAM A. STONE. Then you are simply compelling the officers to do that work for nothing.

Mr. CULBERSON. We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much ex-officio service.

Mr. WILLIAM A. STONE. As I understand, the question as to whether the plaintiff is able or unable to pay the costs is wholly determined by himself.

Mr. CULBERSON. No, sir; not at all.

Mr. LIVINGSTON. This is the same as the law in the State courts.

Mr. WILLIAM A. STONE. In my State they have to pay the costs. I suppose there are States where that is not the case.

Mr. O'NEILL of Missouri. A great many of them.

Mr. CULBERSON. Mr. Speaker, I yield to the gentleman from Pennsylvania to offer an amendment.

Mr. CHARLES W. STONE. Mr. Speaker, I move to amend, first, by inserting at the end of the second section the following words:

> And willful false swearing to any affidavit provided for in this or the previous section shall be punishable as perjury is in other cases.

Mr. CULBERSON. I will accept that.

Mr. CHARLES W. STONE. I also offer another amendment, which is a clerical one, that the word "he," in the second



line of section 4, which as it stands might refer to the poor person, be stricken out and the word "it," referring to the court, be substituted; and that the word "he," in the fourth section, line 5, be stricken out and the words "said court" inserted in place thereof.

Mr. CULBERSON. These are very proper amendments, and I hope they will be adopted. I ask for a vote upon the amendments.

The question was taken, and the amendments were severally agreed to.

Mr. LANHAM. I would like to ask my colleague if he has any objection to striking out the word "probably," in the fifth line of section 4?

Mr. CULBERSON. I have no objection. I think that it would make the section better.

Mr. LANHAM. Then I move to strike out the word "probably," in line 5 of section 4.

The amendment was agreed to.

Mr. JOSEPH D. TAYLOR. I wish to suggest to the gentleman from Texas whether it would not be better to amend the bill so that the plaintiff shall make it appear to the satisfaction of the judge, by affidavit or otherwise, that he is unable to give bond for the costs, and that this proceeding shall be before the order, instead of providing for punishment at the end?

Mr. CULBERSON. If the gentleman will examine section 4 he will see that his idea is there carried out.

Mr. Speaker, I am under obligations to a gentleman who is not present in the House to offer an amendment, which will



not alter the main provisions, and which I think is unnecessary, but which I now offer. At the end of section 5 to insert the words:

Provided, That the United States shall not be liable for any of the costs thus incurred.

I ask that this amendment be adopted.

The amendment was reported by the Clerk.

The amendment was agreed to.

Mr. CULBERSON. I demand the previous question on the engrossment and third reading of the bill as amended.

The previous question was ordered.

The SPEAKER pro tempore. If there be no objection the amendments will be voted upon in gross.

There being no objection, the amendments were adopted.

The bill was ordered to be engrossed

and read a third time; and being engrossed, it was accordingly read the third time, and passed.

Mr. CULBERSON moved to reconsider the vote by which the bill was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.